

## **February 2013 - Vermont Bar Examination Essay Questions**

### **QUESTION 1 - February 2013**

PLEASE NOTE: QUESTION 1 was a "Multistate Performance Test" (MPT) and will be available at [www.ncbex.org](http://www.ncbex.org) at a later date.

### **QUESTION 2 – February 2013**

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### **Question 3 - February, 2013**

Golden Aviation, a Vermont manufacturer, was planning to produce a new line of private aircraft. Golden entered into a contract with Fly-By-Night, a Vermont business specializing in the design of aircraft lighting systems. Fly-By-Night agreed to design the interior aircraft lighting system for Golden's line, to manufacture 20 such systems, and to install those systems.

Golden approved the design of the lighting system, and Fly-By-Night began the manufacturing process. Fly-By-Night contacted Phoenix Technologies, a Vermont manufacturer of specialty LED lamps, to inquire whether Phoenix could provide the LED lamps for the Golden system. Phoenix advised that it could, but it would have to make certain unique modifications so that the lamps could be integrated into the system.

In August 2007, Fly-By-Night submitted a purchase order to Phoenix for 500 LED lamps. The purchase order specified the number of lamps requested and the unit cost per lamp, but it did not specify a particular date for delivery. Phoenix began production of the 500 lamps. Phoenix did not communicate to Fly-By-Night that Phoenix accepted the order.

By January 2008, Phoenix had produced 500 lamps, and had finished customizing 250 lamps to meet Fly-By-Night's specifications. In late January, Fly-By-Night informed Phoenix that Golden contracted with a different lighting manufacturer and was walking away from its contract with Fly-By-Night. Fly-By-Night learned this fact from Golden in December 2007. Fly-By-Night assured Phoenix that it intended to file suit against Golden and that Phoenix would get paid from the proceeds of that lawsuit. Phoenix stopped production on the remaining 250 lamps. Phoenix did not ship any lamps to Fly-By-Night.

By the following year, Fly-By-Night had not filed suit against Golden. Phoenix still had all 500 lamps in its warehouse for which it had not been paid. On May 1, 2009, Phoenix brought suit against Fly-By-Night for breach of contract.

In April of 2012, Fly-By-Night brought suit against Golden for breach of contract.

### **Questions**

1. Was there an enforceable contract between Phoenix and Fly-By-Night? Explain.
2. Assuming there was an enforceable contract, what damages could Phoenix claim and what defenses does Fly-By-Night have that might reduce these damages? Explain.
3. Is Fly-By-Night's claim against Golden time-barred? Explain.

### **Question 4 – February 2013**

In January 2010, Flanders and his wife, Gennie, spent a week at Pure Powder Resort, a Vermont ski resort. Flanders opted to spend one day in the resort rather than on the slopes with Gennie. After Gennie left to ski, Flanders soaked in one of Pure Powder's famed hot tubs. As he got out of the hot tub, he stepped on the tub's drain cover and severely burned his foot.

In December 2011, Flanders sued Pure Powder in Vermont Superior Court. He alleged that Pure Powder had failed to equip the hot tub with a heat resistant drain cover. Flanders' lawsuit did not name any other defendants.

Pure Powder produced records showing that it had installed a drain cover that had been designed and manufactured by SoakRight, Inc., the manufacturer of the hot tub. In addition, Pure Powder produced photographs of a sign that had been posted at the entrance to the hot tub area that read "CAUTION: DRAIN COVERS MAY BE HOT!! STEP CAREFULLY." Flanders's wife also admitted in her deposition that a Pure Powder employee had warned her that the hot tub drain covers may become hot.

The case went to trial. A jury concluded that Pure Powder was not liable to Flanders and returned a verdict in the Pure Powder's favor.

Earlier this week, Flanders met with you for legal advice. He told you that during the lawsuit against Pure Powder, the resort produced documents that showed that both Pure Powder and SoakRight knew that there was a defect in the drain covers that made them likely to become dangerously hot. Flanders asked you to bring a products liability suit against SoakRight for damages.

### **Questions**

1. Is Flanders' contemplated lawsuit against SoakRight precluded by the case he litigated against Pure Powder? Discuss.

2. If Flanders sues SoakRight, what procedural mechanism might SoakRight use to attempt to bring Pure Powder in as a party to the case? Discuss.
3. Would SoakRight's claim against Pure Powder be precluded by Flanders's prior suit against Pure Powder? Discuss.
4. Could SoakRight have been brought in as a party to Flanders's prior suit against Pure Powder? Discuss if so and by whom.

### **Question 5 - February, 2013**

Wendy and Harry were married in 2006. Shortly after they married, they purchased a home in Rutbury, Vermont, as tenants by the entirety. A portion of the purchase price was financed with Big Bank. Only Harry signed the mortgage deed and promissory note to Big Bank. At closing, the notary indicated on the acknowledgment of the mortgage deed that Wendy was the mortgagor. The mortgage deed, acknowledgement, and promissory note were all recorded in the Rutbury land records.

A few years later Harry was laid off from his job. Wendy and Harry were able to make a few more mortgage payments to Big Bank, but they have not made a payment since August 2012. In December 2012, Big Bank commenced a foreclosure action against Wendy and Harry and recorded its foreclosure complaint in Rutbury land records.

In January 2013, Harry found a new job. Harry and Wendy can afford to make the Big Bank mortgage payments going forward, but they need some time to cure their arrears. Big Bank refuses to talk to them. Wendy and Harry's home is currently worth \$270,000 and the outstanding balance due to Big Bank is \$240,000. They want to keep their home and come to you for advice.

### **Questions**

1. Discuss what claims or defenses Wendy and Harry may have to the foreclosure action. Do not address standing issues in your answer.
2. If Wendy and Harry decided to pursue bankruptcy in an attempt to keep their home,
  - a. discuss under which chapter they should file; and
  - b. discuss the reasons for not recommending any other chapters.
3. Explain the steps Wendy and Harry would need to take to commence a bankruptcy proceeding under the chapter you recommend.

### **Question 6 - February, 2013**

You represent Anne, who is the sole proprietor of “Bucketco,” a Vermont company that manufactures maple syrup buckets. Bucketco employs on average 10 people and satisfies all applicable requirements for operating a business in Vermont. Anne has asked for your legal advice as to the following:

Last week, the morning after a severe ice storm, one of Bucketco’s employees, Betty, slipped and fell in the icy company-owned parking lot as she was arriving for work. Betty suffered a severe head injury and may not be able to work again. Anne is typically the first one to arrive at the Bucketco plant in the morning and spreads sand and salt in the parking lot when snow or ice have accumulated. She failed to do so on the morning after the ice storm. Anne feels terrible about Betty’s fall and admits to you that she is solely responsible for maintaining the parking lot.

On the same day as Betty’s accident, a Bucketco customer, Charlene, came to the plant to place an order for buckets. Charlene slipped and fell in the plant’s lobby due to water and snow that had accumulated on the floor. While Anne did not place any warnings near the water and snow, it was clearly visible to Charlene. Charlene’s injuries are minimal; she incurred \$6,000 in medical expenses, and had no other damages. Anne stated at the scene of the accident: “Charlene should have seen the water on the floor. I am at most only half responsible for this accident!”

About a month ago, Anne bought a used bookcase from one of her employees, David. After Anne brought the bookshelf home and loaded it with books, it collapsed, and smashed the antique vase she inherited from her mother, which is valued at \$10,000. When Anne complained to David, he told Anne that he had seen a recall notice from the company warning of a defect in the bookshelf and danger of collapse. David told Anne that he had also been advised that the company had gone through bankruptcy liquidation and had no insurance coverage. After learning this information, David decided not to keep the bookcase and instead sold it to Anne. David said he had simply forgot to tell Anne what he knew about the bookshelf at the time he sold it to her. Anne became angry and told David that he sold her a defective product and that she will sue him for strict products liability and collect tens of thousands in damages.

Finally, Anne tells you that several years ago, on January 1, 2010, she was in a motor vehicle accident. The accident was solely due to the negligent driving by Anne's brother-in-law Edward. Anne suffered a broken wrist. Anne did not want to sue Edward at the time because "he was family." Now Edward has filed for divorce against Anne's sister and Anne has no such reservations.

### **Questions**

Please advise Anne as to each of the following questions. In your analysis, assume that the statements attributed to the parties involved would be admissible in court.

1. What defenses does Anne have to Betty's personal injury claim against Bucketco? Discuss.
2. What defenses does Anne have to Charlene's claim against Anne for damages resulting from Charlene's fall in Bucketco's lobby? Discuss.
3. What defenses does David have to Anne's claim against him for strict products liability? Discuss.
4. What defenses does Edward have to Anne's personal injury claim against him? Discuss.